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Supreme Court, U.S.
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NO.

# IN THE SUPREME COURT OF THE UNITED STATES

*STATE OF COLORADO,*

**Petitioner,**

vs.

*JEFFREY ALLEN KEY,*

**Respondent.**

*ON PETITION FOR A WRIT OF CERTIORARI TO THE COLORADO COURT OF APPEALS*

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

Whether evidence is admissible under the good-faith exception to the exclusionary rule when the evidence was obtained during a search that was conducted in objectively reasonable reliance on precedent holding such searches lawful under the Fourth Amendment, but, after the search, that precedent was overturned by this Court.

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## PETITION FOR A WRIT OF CERTIORARI

The State of Colorado respectfully petitions for a writ of certiorari to review the judgment of the Colorado Court of Appeals in this case.

## OPINION BELOW

The opinion of the Colorado Court of Appeals is unpublished (App., *infra*, 1a-19a).

## JURISDICTION

The judgment of the Colorado Court of Appeals was entered on August 5, 2010. A petition for a writ of certiorari was denied by the Colorado Supreme Court on November 30, 2010 (App., *infra*, 20a-21a). The jurisdiction of this Court is invoked under 28 U.S.C. 1257.

## CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

## STATEMENT

In August 2006, two women reported to the police that, when they were in a nightclub, someone stole a cell phone from a coat and a wallet from a purse. The wallet contained $15 in cash and two debit cards, one that belonged to the victim, which had been placed in an envelope that contained the card's PIN number, and another that belonged to the victim's employer. A nightclub bouncer told police

that he saw respondent go in and out of the nightclub several times that night.

The next day, a bank surveillance system videotaped a man – whose face and body were partially shrouded by a T-shirt or a blanket – using the stolen debit cards to make five $200 withdrawals from one of the victim's bank accounts, and attempting to withdraw funds from the employer's bank account. Later, a detective watched this bank surveillance video and concluded the culprit was respondent – a man he had known for approximately seven years.

On August 23, 2006, a police officer stopped and arrested respondent for driving under restraint. After the arrest, the officer searched the passenger compartment of respondent's car, and he found the cell phone that had been stolen from the nightclub.

Respondent stated that the phone was not his. He stated that he had found it in a park, and he was planning on turning it in. Phone records revealed that phone numbers associated with respondent were dialed from the cell phone around the same time as the ATM withdrawals. The police never found the wallet or debit cards that had been stolen.

The police searched respondent's car again on August 24, 2006, pursuant to a warrant, and found other evidence.

Respondent was charged with three counts of misdemeanor theft, unauthorized use of a financial

transaction device, felony theft, and driving under restraint (App., *infra*, 4a-5a). Prior to trial, respondent filed a motion to suppress evidence seized from the searches of his car (App., *infra*, 4a, 7a). Following a hearing, the trial court determined that the arrest was valid, decided that the cell phone was lawfully seized incident to respondent's arrest, and denied the motion to suppress (App., *infra*, 8a).

Respondent's trial was held in April 2007. On the morning of trial in the District Court of Pitkin County, respondent pleaded guilty to driving under restraint and to two misdemeanor theft counts (App., *infra*, 4a). The jury subsequently convicted respondent of felony theft and misdemeanor theft based on items seized during the warrantless search of his car, and unlawful use of a financial transaction device (App., *infra*, 5a). The trial court sentenced respondent to a one-year jail term for the misdemeanors to which he had pleaded guilty on the morning of trial; a six-month jail term for the misdemeanor of which he was convicted at trial; three years in prison for unlawful use of a financial transaction device; and six years in prison for felony theft (App., *infra*, 5a).

While respondent's case was pending on direct appeal, this Court issued its decision in *Arizona v. Gant*, 129 S. Ct. 1710 (2009), holding that a search incident to the lawful arrest of a recent occupant of a vehicle may include the vehicle's passenger compartment under *New York* v. *Belton*, 453 U.S. 454, 460 (1981), only when the "arrestee is unsecured and within reaching distance of the

passenger compartment at the time of the search" or "when it is 'reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle.'" *Gant*, 129 S. Ct. at 1719 (quoting *Thornton v. United States*, 541 U.S. 615, 632 (2004) (Scalia, J., concurring in the judgment)). The majority opinion in *Gant* thus "reject[ed]" the lower courts' widely accepted understanding of *Belton*.

On March 18, 2010, a division of the Colorado Court of Appeals affirmed respondent's convictions (App., *infra*, 6a). As relevant here, the court concluded that the vehicle search was an unlawful search incident to respondent's arrest under *Gant*, but the division declined to suppress the evidence, holding that the statutory good-faith exception to the exclusionary rule supported the trial court's denial of the motion to suppress.

While respondent's petition for rehearing was pending, the Colorado Supreme Court issued its opinion in *People v. McCarty*, 229 P.3d 1041 (Colo. 2010), rejecting the People's reliance on the good-faith exception to the exclusionary rule. The division ordered the parties to file supplemental briefs, addressing the effect of *McCarty*. On August 5, 2010, the division withdrew its published opinion, issued an unpublished opinion, and reversed respondent's convictions based on *McCarty* (App., *infra*, 1a-19a).

In *McCarty*, the Colorado Supreme Court observed that this Court has not thus far "recognized a good-faith exception to the exclusionary rule for

reliance on prior holdings of its own from which it has subsequently departed, much less for reliance on the erroneous interpretations of its prior holdings by lower courts." 229 P.3d at 1044. It also explained that this Court has held that its Fourth Amendment decisions "retroactively apply to all cases that had not yet become final." *Id.* at 1045 (citing *United States v. Johnson*, 457 U.S. 537, 554-56 (1982)). The court concluded that this Court has "effectively rejected any doctrine of non-retroactivity premised on the exclusionary rule's lack of deterrent effect," and held that "[a] good-faith exception for reliance upon subsequently overruled Supreme Court decisions would therefore appear to be in 'untenable tension' with its retroactivity precedent." *Id.*

In doing so, the Colorado Supreme Court recognized its decision was in conflict with decisions of the Tenth and Eleventh Circuits, *see United States v. Davis*, 598 F.3d 1259, 1263-68 (11th Cir. 2010); *United States v. McCane*, 573 F.3d 1037, 1041-45 (10th Cir. 2009), but concluded that the Ninth Circuit's reasoning in *United States v. Gonzalez*, 578 F.3d 1130, 1132-33 (9th Cir. 2009) was persuasive. *McCarty*, 229 P.3d at 1045.

Petitioner then petitioned the Colorado Supreme Court to issue a writ of certiorari to the court of appeals. Petitioner argued that certiorari should be granted because this Court granted certiorari in *Davis* to address "[w]hether the good-faith exception to the exclusionary rule applies to a search authorized by precedent at the time of the search that is subsequently ruled unconstitutional."

*See Davis v. United States*, 131 S. Ct. 502 (No. 09-11328, Nov. 1, 2010). Petitioner also noted that *McCarty* relied upon the Ninth Circuit's opinion in *Gonzalez*, which is currently pending certiorari in this Court (No. 10-82). Nevertheless, the Colorado Supreme Court denied the petition for a writ of certiorari (App., *infra*, 20a-21a).

## REASONS FOR GRANTING THE PETITION

The Colorado Court of Appeals' refusal to apply the good-faith exception to the exclusionary rule warrants this Court's review. Society expects police officers to comply with the law. "[T]he officers who conducted the search of defendant's vehicle incident to his arrest did so in good-faith reliance upon precedent of [the Colorado Supreme Court] (and virtually every federal appeals court) expressly permitting such a search." *McCarty*, 229 P.3d at 1046-47 (Eid, J., dissenting). A police officer who reasonably relies on settled precedent that authorizes the search of a vehicle acts entirely in objective good faith. That remains true even if a higher court later upsets the settled interpretation of the law and finds a violation. Suppression of the fruits of the search in light of a subsequent change in the law cannot serve the purpose of the exclusionary rule, which is "to deter deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence." *Herring v. United States*, 129 S. Ct. 695, 702 (2009).

The Colorado Court of Appeals was bound by the Colorado Supreme Court's decision in *McCarty*, which expressly found persuasive the Ninth Circuit's

opinion in *Gonzalez*, refusing to apply the good-faith exception to the exclusionary rule. This Court has granted certiorari in *Davis* (No. 09-11328) to determine whether the good-faith exception to the exclusionary rule applies, and the government has petitioned this Court for a writ of certiorari in *Gonzalez* (No. 10-82) to address the conflict between that decision and the decisions of the Fifth, Tenth, and Eleventh Circuits and the Utah Supreme Court. *See McCane*, 573 F.3d at 1042-45, n.5; *United States v. Jackson*, 825 F.2d 853, 865-66 (5th Cir. 1987); *State v. Baker*, 229 P.3d 650, 663-64 (Utah 2010).

Because this case presents the same question as *Davis*, the petition for a writ of certiorari in this case should be held pending this Court's decision in that case.

## CONCLUSION

The petition for a writ of certiorari should be held pending this Court's decision in *Davis* and then disposed of as appropriate.

Respectfully submitted,

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## APPENDIX A

COLORADO COURT OF APPEALS

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Court of Appeals No.: 07CA1257
Pitkin County District Court No. 06CR62
Honorable Robert A. Brown, Judge

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The People of the State of Colorado,

Plaintiff-Appellee,

v.

Jeffrey Allen Key,

Defendant-Appellant.

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ORDER AFFIRMED IN PART, REVERSED IN PART, SENTENCES REVERSED, AND CASE REMANDED WITH DIRECTIONS

Division VI
Opinion by: JUDGE BERNARD
Carparelli and Loeb, JJ., concur

Prior Opinion Announced March 18, 2010,
WITHDRAWN
PETITION FOR REHEARING GRANTED

**NOT PUBLISHED PURSUANT TO C.A.R. 35(f)**
Announced: August 5, 2010

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John W. Suthers, Attorney General, Patricia R. Van Horn, Assistant Attorney General, Denver, Colorado, for Plaintiff-Appellee

Douglas K. Wilson, Colorado State Public Defender, Rebecca R. Freyre, Deputy State Public Defender, Denver, Colorado, for Defendant-Appellant

Defendant, Jeffrey Allen Key, appeals the judgment of conviction entered on jury verdicts finding him guilty of felony theft, misdemeanor theft, and unlawful use of a financial transaction device. Defendant also challenges the manner in which his sentences were imposed. He further appeals the order revoking his probation and the imposition of sentence in a separate case. We affirm in part, reverse in part, and remand for further proceedings.

## I. Facts

One night in August 2006, two women reported to the police that, when they were in a nightclub, someone stole a cell phone from a coat and a wallet from a purse. The wallet contained $15 in cash and two debit cards – one that belonged to the victim, which had been placed in an envelope that contained the card's PIN number, and another that belonged to the victim's employer. A nightclub bouncer told police that he saw defendant go in and out of the nightclub several times that night.

The next day, a bank surveillance system videotaped a man – whose face and body were partially shrouded by a T-shirt or a blanket – using the stolen debit cards to make five, $200 withdrawals from one of the victim's bank accounts, and attempting to withdraw funds from the employer's bank account. Later, a detective watched this bank surveillance video and concluded the culprit was defendant – a man he had known for approximately seven years.

On August 23, 2006, a police officer stopped and arrested defendant for driving under restraint. After the arrest, the officer searched the passenger compartment of defendant's car, and he found the cell phone that had been stolen from the nightclub.

Defendant said that the phone was not his. He stated that he had found it in a park, and he was planning on turning it in. Phone records revealed that phone numbers associated with defendant were dialed from the cell phone around the same time as the ATM withdrawals. The police never found the wallet or debit cards that had been stolen.

The police searched defendant's car again on August 24, 2006, pursuant to a warrant, and found other evidence.

Defendant was charged in 06CR62 based on these events. The court subsequently denied defendant's motion to suppress the evidence that was seized in the searches.

Defendant's trial was held in April 2007. On the morning of trial, defendant pled guilty to driving under restraint and to two misdemeanor theft counts. The guilty pleas for theft were based on the evidence that was recovered during the search of his car conducted pursuant to the search warrant.

The prosecution introduced the bank surveillance video as evidence during the trial, along with photographs that police took of defendant with a T-shirt draped over his head and body, in positions similar to those of the man in the surveillance video.

Over defendant's objection, the trial court granted the jury unrestricted access to the video during its deliberations.

The jury convicted defendant of felony theft and misdemeanor theft based on items seized during the warrantless search of defendant's car, and unlawful use of a financial transaction device.

Shortly after this conviction, in May 2007, the trial court revoked defendant's probation in another case, 05CR50, based on his convictions in 06CR62. In05CR50, defendant had previously pled guilty to possession of a weapon by a prior offender and to felony theft. The court originally sentenced defendant to four years of intensive supervision probation for the weapons conviction, and five years in prison, suspended upon successful completion of intensive probation and parole in another case, for the theft charge. After revoking his probation, the court sentenced him to prison terms of three years for the weapons conviction and a concurrent term of five years for the theft charge.

At the sentencing hearing in 06CR62, the court sentenced defendant to a one-year jail term for the misdemeanors to which he had pled guilty on the morning of trial; a six-month jail term for the misdemeanor of which he was convicted at trial; three years in prison for unlawful use of a transaction device; and six years for felony theft. The court ordered that these sentences were to run concurrently with each other, and consecutively to the sentences imposed in 05CR50.

This appeal concerns both 05CR50 and 06CR62.

## II. Fourth Amendment Claim

### A. Introduction

Defendant argues that we should reverse the convictions arising out of his trial in 06CR62 because the search of his car that discovered the incriminating evidence on which these convictions were based violated the Fourth Amendment. He contends that the United States Supreme Court's recent decision of *Arizona v. Gant*, ___ U.S. ___, 129 S.Ct. 1710, 1719 (2009), expressly holds that certain searches of automobiles incident to arrest, such as the one here, are unconstitutional. In the alternative, defendant submits that we should remand 06CR62 to the trial court for further findings in light of *Gant*.

We agree that *Gant* must be applied to resolve his case because this direct appeal was pending when *Gant* was decided. Based on a recent decision by our supreme court, *People v. McCarty*, 229 P.3d 1041, 1044-46 (Colo. 2010), we further agree that *Gant* requires us to reverse defendant's convictions. In doing so, we reject the prosecution's argument that *Gant*'s effect was only to render the search a good-faith "technical violation" of the law, which would mean that the evidence remains admissible under section 16-3-308, C.R.S. 2009.

Our original opinion in this appeal agreed with the prosecution's argument. However, the

supreme court issued its decision in *McCarty* shortly after we issued that decision. Defendant filed a petition for rehearing, citing *McCarty*. After reviewing supplemental briefs from the parties, we hold that *McCarty* controls the disposition of this case. *See People v. Allen*, 111 P.3d 518, 520 (Colo. App. 2004)(court of appeals is bound by decisions of supreme court). Therefore, we grant defendant's petition for rehearing, withdraw the previous opinion, and issue this one in its stead.

B. Motion to Suppress

Before trial, defendant filed a motion to suppress "all evidence taken and seized from his automobile on August 23, 2006," which included the cell phone, arguing that the search of the car that discovered it was illegal. A hearing was held on this motion in February 2007.

In a written response to defendant's motion, the prosecution argued that (1) a police officer lawfully stopped defendant driving a car and then lawfully arrested him; (2) the officer conducted a lawful search incident to defendant's arrest and discovered the incriminating evidence; and (3) citing *People v. Savedra*, 907 P.2d 596, 598 n.1 (Colo. 1995), "[t]he passenger compartment of the automobile may be searched by police pursuant to arrest even where [the] arrestee is away from the vehicle and safely within police custody at the time of the search."

The evidence at the suppression hearing established that the officer was aware that

defendant's driving privileges were revoked. When the officer saw defendant driving his car, the officer stopped defendant and arrested him. The officer handcuffed defendant, and placed him in a patrol car. The officer then searched defendant's car, and discovered the cell phone on the floor.

Subsequently, the car was searched pursuant to a warrant. As a result, the police also recovered additional evidence.

Defendant argued that the arrest was not lawful. Therefore, in his view, the search incident to the arrest was not lawful.

The prosecution contended that the arrest was legal, and that the cell phone was seized incident to that lawful arrest. The prosecution also argued that, because the car was later searched pursuant to a search warrant, the cell phone inevitably would have been discovered, and that defendant did not have standing to contest the seizure of the cell phone because he told the police that he had found it and did not own it.

The trial court determined that the arrest was valid, decided that the cell phone was lawfully seized incident to defendant's arrest, and denied the motion to suppress. The court stated that the cell phone would be admissible evidence because defendant "asserted [that it] was not his," which suggests that the court determined that defendant did not have standing to contest the search of the car that led to the seizure of the cell phone. The court also determined that the other items were lawfully

seized in the second search of the car, which had been conducted with a search warrant. Last, the court did not address the prosecutor's inevitable discovery argument.

Defendant filed a timely appeal from his convictions, which was pending when *Gant* was decided in April 2009.

C. General Principles Guiding Our Review

When reviewing a motion to suppress, we defer to the trial court's findings of fact if they are supported by competent evidence in the record, but we review the trial court's legal conclusions de novo. *People v. Heilman*, 52 P.3d 224, 227 (Colo. 2002). We may determine the legal effect of undisputed facts. *See Turbyne v. People*, 151 P.3d 563, 572 (Colo. 2007)("When the controlling facts are undisputed . . . the legal effect of those facts constitutes a question of law.").

D. Standing

As a threshold matter, the prosecution argues that defendant lacks standing to challenge the seizure of the cell phone because he told the police that it was not his, and that he had found it. This issue was raised at the suppression hearing, and the court made a comment suggesting that it agreed with the prosecution's position. However, we conclude that defendant had standing to contest the search of his car and the resulting seizure of the cell phone.

Defendant bore the burden of demonstrating that he was entitled to protection under the Fourth Amendment. *People v. Galvadon*, 103 P.3d 923, 927-28 (Colo. 2005). A defendant "may challenge the constitutional validity of a search only if he has 'a legitimate expectation of privacy in the invaded place.'" *People v. Savage*, 630 P.2d 1070, 1072 (Colo. 1981)(quoting *Rakas v. Illinois*, 439 U.S. 128, 143 (1978)). To determine whether a defendant possesses this legitimate expectation of privacy, courts consider, among other factors, whether the defendant has a "possessory or proprietary interest in the areas or items which are the subject of the search." *People v. Naranjo*, 686 P.2d 1343, 1345 (Colo. 1984)(citing *Rakas*, 439 U.S. at 148)). In the context of automobiles, a motorist's privacy interest in his vehicle is "important and deserving of constitutional protection." *Gant*, ___ U.S. at ___, 129 S.Ct. at 1720 (citing *Knowles v. Iowa*, 525 U.S. 113, 117 (1998)).

Here, although defendant disclaimed ownership of the cell phone, the prosecution does not contest defendant's ownership of the car when it was searched. Therefore, defendant had a legitimate expectation of privacy in the car that was protected by the Fourth Amendment. *Virgin Islands v. Williams*, 739 F.2d 936, 939 (3d Cir. 1984)("Because [defendant] owned the car that was searched and seized . . . we believe that he satisfied the 'legitimate expectation of privacy' requirement of successful Fourth Amendment claims."); *see also Naranjo*, 686 P.2d at 1346 (finding that defendant had a legitimate expectation of privacy in an automobile where the automobile's owner – a member of

defendant's family – had given defendant permission to drive it).

Hence, defendant has standing to challenge the introduction of the cell phone into evidence.

E. Search Incident to Arrest

*Gant* changed the legal landscape throughout the United States, including Colorado, by holding that, when a defendant is secured and beyond reaching distance of the car's passenger compartment, a search of the car is unreasonable unless the police are searching for evidence of the "offense of arrest," they obtain a warrant, or they conduct the search under another recognized exception to the warrant requirement. ___ U.S. at ___, 129 S.Ct. at 1723-24; *see, e.g.*, *Savedra*, 907 P.2d at 598 (holding that police could search a suspect's car after he had been handcuffed and placed in a patrol car).

We must apply *Gant* to defendant's case because it was pending on direct appeal when *Gant* was announced. *Griffith v. Kentucky*, 479 U.S. 314, 328 (1987); *Lopez v. People*, 113 P.3d 713, 716 (Colo. 2005); *see United States v. Peoples*, 668 F. Supp. 2d 1042, 1045 (W.D. Mich. 2009)("*Gant*'s holding must undoubtedly apply to all cases pending on direct review.")(citing *Griffith*, 479 U.S. at 328).

Here, the facts support the trial court's conclusion that defendant's arrest was lawful. The police officer who stopped defendant was aware that his driving privileges had been revoked, which is

clearly sufficient probable cause to believe that defendant had committed a crime. *See People v. Veren*, 140 P.3d 131, 135 (Colo. App. 2005).

However, in the course of the arrest, the officer handcuffed defendant and placed him in the patrol car before searching the automobile. Therefore, he was not within reaching distance of the passenger compartment at the time of the search.

Defendant was arrested for driving under restraint. The record indicates that there was little or no likelihood that defendant's car contained evidence of this offense because (1) the officer confirmed that defendant's driving privileges had been revoked before the stop; and (2) the officer saw defendant driving.

Therefore, under *Gant*, we conclude that the police officer violated defendant's Fourth Amendment rights when he searched defendant's car. Further, based on *McCarty*, we reject the prosecution's argument that the good-faith exception to the exclusionary rule, as expressed in Colorado in section 16-3-308, applies to this case.

As pertinent here, section 16-3-308 states:

> (1) Evidence which is otherwise admissible in a criminal proceeding shall not be suppressed by the trial court if the court determines that the evidence was seized by a peace officer . . . as a result of a . . . technical violation.

(2) As used in subsection (1) of this section . . .

> (b) "Technical violation" means a reasonable good faith reliance upon a statute which is later ruled unconstitutional, a warrant which is later invalidated due to a good faith mistake, or a court precedent which is later overruled.

Although the majority in *McCarty* did not refer to this section of the statute, it concluded that the United States Supreme Court had not held that the good-faith exception to the exclusionary rule applied to judicial precedent that was subsequently overturned. This was so because "[a] good-faith exception for reliance upon subsequently overruled Supreme Court decisions would therefore appear to be in 'untenable tension' with its retroactivity precedent." *McCarty*, 229 P.3d at 1045. Thus, the majority concluded that it was "reluctant to expand the good-faith exception to the . . . exclusionary rule beyond the limits set" by the United States Supreme Court. *Id.* at 1046. Therefore, based on *Gant* and *McCarty*, we conclude that the warrantless search of defendant's car was not a legal search incident to defendant's arrest.

F. Prosecution's Alternative Arguments

The prosecution raises two alternative arguments to justify the cell phone's seizure.

1. Inevitable Discovery

The prosecution contended at the suppression hearing that the search of the car was justified by the inevitable discovery doctrine because a warrant was obtained to search the car the day after defendant was arrested. We conclude that the evidence presented at the suppression hearing does not support the application of this doctrine.

If the prosecution can establish that evidence would have subsequently and inevitably been discovered lawfully, then evidence that is initially discovered by an unconstitutional means will nonetheless be admitted at trial. *People v. Diaz*, 53 P.3d 1171, 1176 (Colo. 2002). The fundamental requirement of this doctrine is that the police must be pursuing the legal means of discovery, such as obtaining a search warrant, at the *same time* that the illegal search occurs. The fact that the police could have obtained a lawful search warrant after the illegal search will not serve. *Id.*

Here, the record of the suppression hearing does not indicate that the police were pursuing a search warrant when the officer stopped the car and then searched it after defendant's arrest. Therefore, applying the reasoning in *Diaz*, we conclude that the inevitable discovery doctrine does not apply here.

1. Probable Cause

The prosecution contends that the police had probable cause to search the car without a warrant

under the automobile exception to the warrant requirement. *See generally People v. Reyes*, 956 P.2d 1254, 1256 (Colo. 1998)(officers may "conduct a warrantless search of an automobile if [they] have probable cause to believe that the automobile contains evidence of a crime"). "In the case of a search, probable cause means reasonable grounds to believe that contraband or evidence of criminal activity is located in the area to be searched." *People v. Melgosa*, 753 P.2d 221, 225 (Colo. 1988).

In support of this argument, the prosecution focuses on two items: a sunroof and some alcohol that were in defendant's car at the time of his arrest. We conclude, for the following reasons, that the record of the suppression hearing does not contain evidence establishing reasonable grounds to believe that the sunroof or the alcohol was evidence of criminal activity or contraband.

a. Sunroof

On August 9, 2006, a resident of Aspen reported that her Ford Explorer's sunroof had been stolen. Defendant lived near the location where the theft occurred, and he also drove a Ford Explorer. On August 22, 2006, an Aspen police officer looked into defendant's parked car, and saw a sunroof in its back seat in plain view. Defendant was stopped and arrested on the next day, and the sunroof was still in the car's back seat.

The officer who arrested defendant called the victim of the theft, who came to the scene of the arrest. She looked at the sunroof, but she could not

positively identify it as hers. The record of the suppression hearing does not contain any further information linking the sunroof found in defendant's car with the stolen sunroof.

The record shows that a Ford Explorer sunroof was stolen, that defendant lived near where the theft occurred, that defendant's car was a Ford Explorer, and that defendant had a sunroof in his car about two weeks later on the day before his arrest, and on the following day when he was arrested. However, the record also establishes that the victim of the theft could not identify the sunroof as hers when summoned to the scene where defendant was arrested, and that the officer did not seize the sunroof at the time of the warrantless search.

There is no other information in the record of the suppression hearing that linked the sunroof in defendant's car to the stolen one at the time of the search of defendant's car. We note that documents in the record indicate that, on the day after the search, an officer executing the search warrant looked at the sunroof in defendant's car and noted that its hinges did not match the hinges on defendant's car, but that the sunroof's hinges matched the hinges of the theft victim's car. We have no reason to believe, based on the transcript of the suppression hearing, that the officer who arrested defendant likewise made this observation at the time of defendant's arrest. Thus, we do not consider this information for purposes of determining whether probable cause existed at the time of the search. *See People v. Scott*, 227 P.3d 894,

898 (Colo. 2010)("probable cause cannot be established after the search").

b. Alcohol

The record indicates that the officer found "[a]lcohol and some pills that were kind of a suspicious origin." According to the officer's testimony, these items "were of interest" to a probation officer, but there is no further testimony describing what the alcohol was, or why a probation officer would be interested in it.

The record does not establish what the alcohol and the pills were. It does not show that the alcohol was in an open container, that the alcohol or the pills were otherwise being transported illegally, or that possession of either the alcohol or the pills was *per se* illegal. Although there is a statement that the alcohol and some pills were of "some interest" to a probation officer, there is no explanation of what the "interest" was.

G. Conclusions

As a result, for the foregoing reasons, we conclude that defendant's motion to suppress the evidence discovered in the search of his car on August 23, 2006, should have been granted. We therefore reverse the judgment of conviction in 06CR62, based on the jury verdicts at trial, for felony theft, misdemeanor theft, and unlawful use of a financial transaction device, and the sentences for those offenses. We remand for a new trial on those charges. *See, e.g., People v. Brandon*, 140 P.3d 15,

23 (Colo. App. 2005)(reversing and remanding for new trial after concluding that motion to suppress should have been granted). In the course of the proceedings on remand, the trial court should allow the parties to present argument, based on the record made at the suppression hearing, concerning the effect of this holding on the search conducted pursuant to a warrant on August 24, 2006. *See People v. Cruse*, 58 P.3d 1114, 1118 (Colo. App. 2002)(appellate court should remand for further proceedings where resolution of suppression motion requires additional findings of fact).

III. Remaining Convictions

We do not reverse the judgments of conviction or the sentences based on defendant's guilty pleas, entered in 06CR62 on the day of trial, to driving under restraint and to two counts of misdemeanor theft. *See People v. Neuhaus*, ___ P.3d ___, ___ (Colo. App. No. 07CA0896, Nov. 25, 2009)(guilty plea forfeits defendant's right to argue that his conviction is undermined by an illegal search).

This last conclusion supports the trial court's revocation of defendant's probation in 05CR50. The motion to revoke defendant's probation referred to all the charges in this case, and stated that defendant had failed to comply with one of the conditions of probation because he had violated the law. Defendant's guilty pleas in 06CR62 established a basis for a finding that defendant had violated the law, and thus supported revocation of defendant's probation in 05CR50.

However, we reverse the sentences the trial court imposed in 05CR50 as a result of the probation revocation because, based on our review of the record, we cannot eliminate the possibility that the sentences in 05CR50 were based on defendant's felony convictions here.

Because we are reversing certain of defendant's convictions and sentences and remanding for a new trial on the convictions that we have reserved, we do not address his other contentions.

In 05CR50 the order revoking defendant's probation is affirmed and the sentences are reversed; in 06CR62 the judgment and sentences are affirmed as to the convictions based on defendant's guilty pleas and reversed as to the other convictions; and in both 05CR50 and 06CR62, the case is remanded for further proceedings consistent with this opinion.

JUDGE CARPARELLI and JUDGE LOEB concur.

## APPENDIX B

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|---|---|
| Colorado Supreme Court<br>101 West Colfax Avenue, Suite 800<br>Denver, CO 80202 | |
| Certiorari to the Court of Appeals, 2007CA1257<br>District Court, Pitkin County, 2005CR50 and 2006CR62 | |
| **Petitioner:**<br><br>The People of the State of Colorado,<br><br>v.<br><br>**Respondent:**<br><br>Jeffrey Allen Key | Supreme Court Case No: 2010SC589 |
| ORDER OF COURT | |

Upon consideration of the Petition for Writ of Certiorari to the Colorado Court of Appeals and after review of the record, briefs, and the judgment of said Court of Appeals,

IT IS ORDERED that said Petition for Writ of Certiorari shall be, and the same hereby is, DENIED.

BY THE COURT, EN BANC, NOVEMBER 30, 2010.·